

3.01 DUTIES OF JURY TO FIND FACTS AND FOLLOW LAW

Members of the jury, now that you have heard all the evidence and the arguments of the attorneys, it is my duty to instruct you on the law which applies to this case. A copy of these instructions will be available in the jury room for you to consult if you find it necessary.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions or into anything the court may have said or done any suggestion as to what verdict you should return--that is a matter entirely up to you.

3.02 USE OF NOTES

You may use notes taken during trial to assist your memory. Notes, however, should not be substituted for your memory, and you should not be overly influenced by the notes.

3.03 WHAT IS EVIDENCE

The evidence from which you are to decide what the facts are consists of:

1. the sworn testimony of witnesses, on both direct and cross-examination, regardless of who called the witness;
2. the exhibits which have been received into evidence; and
3. any facts to which all the lawyers have agreed or stipulated.

3.05 WHAT IS NOT EVIDENCE

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.
2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.
3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered. In addition some testimony has been received only for a limited purpose; where I have given a limiting instruction,

you must follow it.

4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

3.06 DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what the witness personally saw or heard or did. For example, the witness testifies “I saw Joe break the glass”. Circumstantial evidence is proof of one or more facts from which you could find another fact. For example, the witness testifies “I saw Joe holding the glass before I left the room. No one else was in it. When I returned, the broken glass was lying at Joe’s feet.” You could find that Joe had broken the glass in either example. You must consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

3.07 CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;
2. the witness' memory;
3. the witness' manner while testifying;
4. the witness' interest in the outcome of the case and any bias or prejudice;
5. whether other evidence contradicted the witness' testimony;
6. the reasonableness of the witness' testimony in light of all the evidence; and
7. any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify.

BAJI 2.21

DISCREPANCIES IN TESTIMONY

Discrepancies in a witness's testimony or between such witness's testimony and that of other witnesses, if there were any, do not necessarily mean that any witness should be discredited. Failure of recollection is common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to an important matter or only to something trivial should be considered by you.

3.12 TWO OR MORE PARTIES--DIFFERENT LEGAL RIGHTS

You should decide the case as to each plaintiff and defendant separately. Unless otherwise stated, the instructions apply to all parties.

5.01 BURDEN OF PROOF--PREPONDERANCE OF THE EVIDENCE

When a party has the burden of proof on any claim by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim is more probably true than not true. This means that if you conclude that the weight of the evidence on a claim is even, you must find for the defendants. If you conclude that the weight of the evidence favors the plaintiffs, even slightly, you must find for them.

You should base your decision on all of the evidence, regardless of which party presented it.

Instructions on Section 1983 Claim:

Plaintiff has brought this lawsuit under a Federal statute, 42 U.S.C. section 1983, which provides a right to sue for the violation of rights protected under the United States Constitution.

Section 1983 provides:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

11.01 Violation of Federal Civil Rights))Elements and Burden of Proof (42 U.S.C. § 1983)

On plaintiffs' Section 1983 claims, the plaintiffs have the burden of proving each of the following by a preponderance of the evidence:

1. The acts by defendants Pendergast or Wick were intentional;
2. The defendants acted under color of law;
3. The acts of the defendants caused the plaintiffs to suffer the loss of a federal right protected by the Constitution of the United States; and,
4. The acts of the defendants were a proximate cause of the deprivations of the plaintiffs' rights protected by the Constitution of the United States.

If you find that each of these elements has been proved against either defendant or both, your verdict should be for the plaintiffs and against the appropriate defendants on the federal civil rights claims. On the other hand, if any of these elements has not been proved against one or both of the defendants, your verdict should be for the appropriate defendant.

Intentional State of Mind - Defined

An act is intentional if it is done knowingly -- that is if it is done voluntarily and deliberately and not because of mistake, accident, negligence or other reason.

No Specific Intent Requirement

It is not necessary to find that any defendant had a specific intent to deprive any plaintiff of his civil rights in order to find in favor of the plaintiffs. The plaintiffs are entitled to relief if intentional conduct by the defendants resulted in the violation of the plaintiff's rights.

80.18 “Proximate Cause” Defined

An injury or damage is proximately caused by an act, or a failure to act, if the act or omission played a substantial part in bringing about or actually causing the injury or damage, and the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

11.01.01 Under Color of Law Defined

The plaintiffs claim that Officer Pendergast and Chief Wick were acting under color of law of the State of California when the defendants allegedly deprived the plaintiffs of their constitutional rights.

Acts are done under color of law when a person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance, or regulation.

In order for an act to be under color of state law, the act must be of such nature and committed under such circumstance that it would not have occurred except for the fact that the defendants were officials of the state. The act of a state official in pursuit of his personal aims that is not accomplished by virtue of his state authority is not action under color of state law merely because the individual happens to be a state officer.

Physical Injury Not Required

Physical injury to any plaintiff is not required to establish a violation of his constitutional rights.

Retaliation

The Constitution of the United States of America guarantees all citizens the right to petition the government for redress of grievances. This is a constitutionally protected right.

If a citizen complains about a police officer's conduct, and that officer retaliates against the citizen because he complained, the officer has violated the citizen's constitutionally protected right. The citizen's rights may be violated even if the officer's acts would be proper if taken for a reason other than retaliation.

Due Process

The Constitution of the United States of America guarantees all citizens the right to due process, which includes the right of the accused criminal to a fair trial. Failing to preserve or destroying exculpatory evidence may constitute a denial of due process.

In order to find that Harold Dutra, Jr.'s ("Junior") due process rights were violated you must find:

(1) that evidence was made unavailable for the purpose of Junior's criminal defense;

(2) that it was apparent before the evidence was made unavailable that the evidence might help Junior;

(3) that Junior was unable to obtain comparable evidence by other reasonably available means;

(4) there was bad faith on the part of one or more defendants in making the evidence unavailable.

SUPERVISORY OFFICIALS

If you find that the conduct of Officer Pendergast denied the plaintiffs a right guaranteed by federal law, you must consider whether his supervisor, Police Chief Wick, caused that conduct. If Chief Wick did cause the conduct, then he is liable under section 1983 for the denial of plaintiffs' constitutional right.

If Officer Pendergast denied a plaintiff a constitutional right, Chief Wick is not liable for such a denial simply because he is Officer Pendergast's supervisor.

But there are circumstances under which you may find that Chief Wick has caused a plaintiffs' injury, and thus is liable for the illegal conduct of Officer Pendergast. If you find that Chief Wick failed to properly carry out his duty to supervise Officer Pendergast, knowing that his failure to do so probably would cause a deprivation of the plaintiff's rights by Officer Pendergast, you should find that Chief Wick caused the injury. To make such a finding, you must conclude by a preponderance of the evidence that Chief Wick had a duty to oversee Officer Pendergast, that he grossly disregarded that duty, and that a reasonable person in the Chief's position would have known that his dereliction

of duty probably would cause a deprivation of rights.

11.03.01 Municipal Liability

When any plaintiff is deprived of a constitutional right as a result of the official policy of the Half Moon Bay Police Department, the department is liable for the deprivation.

11.03.02

Municipal Liability -- Official Policy Defined

"Official policy" means:

1. A policy statement or decision that is officially made by the police department's policy-making official;
2. A custom that is a permanent, widespread, well-settled practice that constitutes a standard operating procedure of the police department; or,
3. an act or omission ratified by the policy-making official.

11.03.03 Official Policy Maker

The acts or omissions of Defendant Police Chief Dennis Wick constitute official policy of the Half Moon Bay Police Department.

BAJI 12.70 INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In addition to their federal civil rights claim, the plaintiffs also seek to recover damages based upon a claim of intentional infliction of emotional distress.

For any plaintiff to prevail on this claim, he must prove by a preponderance of the evidence each of the following essential elements of such a claim against defendant Officer Pendergast:

1. The defendant engaged in outrageous conduct;
2. The defendant intended to cause plaintiff to suffer emotional distress;
3. The plaintiff suffered severe emotional distress.
4. Such outrageous conduct of the defendant was a cause of the emotional distress suffered by the plaintiff.

For any plaintiff to prevail on this claim against the Half Moon Bay Police Department, the plaintiff must also prove by a preponderance of the evidence that Officer Pendergast intentionally inflicted emotional distress on the plaintiff in the course and scope of his employment as a Half Moon Bay police officer.

BAJI 12.72 EMOTIONAL DISTRESS -- DEFINED

The term "emotional distress" means mental distress, mental suffering or mental anguish. It includes all highly unpleasant mental reactions, such as fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation and indignity, as well as physical pain.

BAJI 12.73 SEVERE -- DEFINED

The word "severe," in the phrase "severe emotional distress" means substantial or enduring as distinguished from trivial or transitory. Severe emotional distress is emotional distress of such substantial quantity or enduring quality that no reasonable person in a civilized society should be expected to endure it.

In determining the severity of emotional distress you should consider its intensity and duration.

BAJI 12.74 EXTREME AND OUTRAGEOUS CONDUCT -- DEFINED

Extreme and outrageous conduct is conduct which goes beyond all possible bounds of decency so as to be regarded as atrocious and utterly intolerable in a civilized community.

Extreme and outrageous conduct is not mere insults, indignities, threats, annoyances, petty oppressions or other trivialities. All persons must be expected and required to be hardened to a certain amount of rough language and to occasional acts that are definitely inconsiderate and unkind.

Extreme and outrageous conduct, however, is conduct which would cause an average member of the community to immediately react in outrage.

BAJI 12.75 EFFECT OF RELATIONSHIP OF PARTIES

The extreme and outrageous character of the conduct of the defendant may arise from an abuse of a position, or relationship to a plaintiff, which gives such a defendant actual or apparent authority over a plaintiff, or power to affect a plaintiff's interests.

BAJI 12.76 SUSCEPTIBILITY OF PLAINTIFF

The extreme and outrageous character of a defendant's conduct may arise from defendant's knowledge that a plaintiff is peculiarly susceptible to emotional distress by reason of some physical or mental condition or peculiarity. Conduct may become extreme and outrageous when a defendant proceeds in the face of such knowledge, where it would not be so if defendant did not know.

BAJI 12.77 INTENTIONAL AND RECKLESS -- DEFINED

A defendant intended to inflict emotional distress if it is established that he desired to cause such distress or knew that such distress was substantially certain to result from his conduct.

A defendant's conduct is in reckless disregard of the probability of causing emotional distress if he has knowledge of a high degree of probability that emotional distress will result and acts with deliberate disregard of that probability or with a conscious disregard of the results.

BAJI 13.01 SCOPE OF EMPLOYMENT - DEFINED

It is not necessary that a particular act or failure to act be expressly authorized by the Half Moon Bay Police Department to bring it within the scope of Officer Pendergast's employment. Such conduct is within the scope of his employment if it occurred while Officer Pendergast was engaged in the duties which he was employed to perform and related to those duties. Conduct for the benefit of the principal, the Half Moon Bay Police Department, which is incidental to, customarily connected with or reasonably necessary for the performance of an authorized act is within the scope of a police officer's employment.

11.04 Damages

If you find for plaintiffs on any of their claims, you must determine plaintiffs' damages. Plaintiffs have the burden of proving damages by a preponderance of the evidence. Damages means the amount of money which will reasonably and fairly compensate the plaintiffs for the injury you find was proximately caused by the defendants. You should consider the following:

The nature and extent of each plaintiff's injuries.

The loss of enjoyment of life experienced and which will, with reasonable probability, be experienced by each plaintiff in the future.

The mental, physical and emotional pain and suffering experienced and which will, with reasonable probability, be experienced by each plaintiff in the future.

The reasonable value of necessary medical care, treatment, and services a plaintiff has received to the present time.

The reasonable value of wages, earnings, earning capacity, and employment a plaintiff has lost to the present time.

If you find that a plaintiff's constitutional rights were violated, but you find that the plaintiff has failed to prove actual damages, you shall return an award

of nominal damages not to exceed one dollar as to that plaintiff.

BAJI 14.62 PLEADINGS OF ARGUMENT--NOT EVIDENCE OF DAMAGES

The amount of damages claimed in the argument of counsel must not be considered by you as evidence of reasonable compensation.

7.05 Punitive Damages

If you find that Officer Pendergast violated any plaintiff's constitutional rights, you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish a defendant and to deter a defendant and others from committing similar acts in the future.

Plaintiffs have the burden of proving that punitive damages should be awarded, and the amount, by a preponderance of the evidence. You may award punitive damages only if you find that Officer Pendergast's conduct was malicious or in reckless disregard of plaintiffs' rights. Conduct is malicious if it is accompanied by ill will or spite, or if it is for the purpose of injuring another. Conduct is in reckless disregard of plaintiffs' rights if, under the circumstances, it reflects complete indifference to the safety and rights of plaintiffs.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party.

Punitive damages may be awarded even if you award a plaintiff only nominal, and not compensatory, damages. They may be awarded to one, two

or all three plaintiffs.

Multiple Claims - Multiple Defendants

You should not award compensatory damages more than once for the same injury. For example, if a plaintiff were to prevail on two claims and establish a one dollar injury, you could not award him one dollar compensatory damages on each claim - he is only entitled to be made whole again, not to recover more than he lost. Of course, if different injuries are attributed to the separate claims, then you must compensate him fully for all of the injuries.

You must be careful to impose any damages that you may award on a claim solely upon the defendant or defendants whom you find to be liable on that claim. Although there are three defendants in this case, it does not follow that if one is liable, all or any of the others are liable as well. Each defendant is entitled to fair, separate, and individual consideration of the case without regard to your decision as to the other defendants. If you find that only one defendant is responsible for a particular injury, then you must impose damages for that injury only upon that defendant.

You may also find that more than one defendant is liable for a particular injury. If two or more persons unite in an intentional act that violates another person's right, then all of those persons are jointly liable for the acts of each of them. In a case such as this, the law does not require the injured party to establish how much of the injury was done by each particular defendant that you find liable. Thus, if you find that the defendants whom you find to be liable acted jointly, you may treat them jointly for purposes of assessing damages by simply determining the overall amount of damages for which they are liable. You need not break that figure down to individual percentages.

BAJI 15.20 JURY NOT TO TAKE CUE FROM JUDGE

I have not intended by anything I have said or done, or by any questions that I have asked, to suggest how you should decide any questions of fact, or that I believe or disbelieve any witness.

If anything I have done or said has seemed so to indicate, you must disregard it and form your own opinion.

3.13 COMMUNICATION WITH COURT

If it becomes necessary to communicate with me during deliberations, you may send a folded note through the marshal or clerk, signed by a juror. Do not disclose the content of your note to the marshal or clerk.

Do not communicate with the court about the case except by a signed note. I will only communicate with you regarding the case in writing or in open court.

Do not disclose any vote count in any note to the court.

3.14 DUTY TO DELIBERATE

When you retire, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully and with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

3.15 RETURN OF VERDICT

After you have reached unanimous agreement on a verdict, your foreperson will fill in, date, and sign the verdict form and advise the marshal in whose charge you will be that you have reached a verdict.